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Components of Eminent Domain: An Ancient Tool for Contemporary Use

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COMPONENTS OF EMINENT DOMAIN: AN ANCIENT TOOL FOR CONTEMPORARY USE

Legal principles, like metals, assume different forms and attain various degrees of strength when submitted to practical tests to measure their usefulness. Following such tests, analysis can be made to determine future adaptability in various situations, and useful application.

For centuries the power of eminent domain has been submitted to various tests to determine its value in organized society. Its usage has had an immeasurable influence on the physical growth and development of our resources, industries, and communities. Accordingly, this power has materially guided the economic development of our nation. Obviously, such a dominant factor has had a parallel effect on our people and way of life.

To grasp fully an understanding of this concept, it is not only noteworthy to learn the historical origin and evolution of its development, but it is mandatory if the present day use of eminent domain powers is to be accurately interpreted.

DEFINITION AND HISTORICAL REVIEW

In its absolute state, eminent domain is the power of the sovereign to appropriate property for public use without the consent of the owner.[1] Expressed differently by hundreds of courts in the United States since colonial days, the definition basically contains only these components: (1) power of the sovereign to take (2) without the owner's consent (3) for public use.

Today, this definition necessarily includes a fourth component: just compensation for the land taken. This accepted limitation, however, does not stem from the absolute power of eminent domain, but is a limitation to its valid exercise. In the relationship of condemnation and compensation, it is universally recognized that when private property is taken through eminent domain proceedings, compensation will be

1. United States v. Certain Property in the Borough of Manhattan, 306 F.2d 439, (2d Cir. 1962); Scott v. Toledo, 36 Fed. 385 (N.D. Ohio 1888); Department of Public Works & Buildings v. Kirkendall, 415 Ill. 214, 112 N.E.2d 611 (1953); Groff v. Bird-in-Hand Turnpike, 128 Pa. 621, 18 Atl. 431 (1889).

included in the definition and in application;[2] it is not, however, an element of its basic definition.[3]

Definitions are only a stepping stone to understanding. Accordingly, the implicit complexities inherent in the eminent domain power render a concise definition almost useless in terms of practical application. It is important, therefore, that those who would applaud its virtues or condemn its evils understand the personality of its powers.

The basic concept of eminent domain may be found in the *Old Testament* and in Greek literature.[4] During the Roman Empire, Emperor Diocletian exercised eminent domain powers to appropriate property that fell within the rights-of-way of his famous aqueducts for the baths of Rome.[5] In 302 A.D., however, the rights of private individuals were of little or no import to such governmental action.

It was not until 1625 that the taking of private property for public use as a distinct governmental power was analyzed

2. United States v. Jones, 109 U.S. 513, 27 L.Ed. 1015 (1883); Bailey v. Housing Authority of Bainbridge, 214 Ga. 790, 107 S.E.2d 812 (1959); Lafayette Hotel v. County of Erie, 26 Misc.2d 755, 205 N.Y.S.2d 626 (1960); Wissler v. Yadkin River Power Co., 15 N.C. 465, 74 S.E. 460 (1912); Commonwealth v. Plymouth Coal Co., 232 Pa. 141, 81 Atl. 143 (1911); Lindsay v. East Bay St. Comm'rs, 2 Bay 38 (S.C. 1796).

3. See 1 THAYER, CASES ON CONSTITUTIONAL LAW 953 (1895) "But while this obligation [i.e., compensation for property taken by the sovereign] is thus well established and clear, let it be particularly noticed upon what grounds it stands, *viz.*, upon the natural rights of the individual. On the other hand, the right of the state to take springs from a different source, *viz.*, a necessity of government. These two, therefore, have not the same origin; they do not come, for instance, from any implied contract between the State and the individual that the former shall have the property, if it will make compensation; the right is no mere right of pre-emption, and it has no condition of compensation annexed to it, either precedent or subsequent. But there is a right to take, and attached to it as an incident, an obligation to make compensation; this latter, morally speaking, follows the other like a shadow, but it is distinct from it, and flows from another source."

4. In 1 *Kings* 21 the appropriation of Naboth's vineyard by Ahab, King of Israel (875-53 B.C.) is recorded. When money or another vineyard was refused, Jezebel secured it by causing Naboth and his sons to be executed on a false charge of blasphemy.

In the Athenian Constitution by Aristotle the quarrel between Eleusis and Athens was settled by several conditions including the following: "If any of the seceding party [i.e., discontented Athenians] wished to take a house in Eleusis, the people would help them to obtain the consent of the owner; but if they could not come to terms, they should appoint three valuers on either side, and the owner should receive whatever price they should appoint." II ENCYCLOPEDIA BRITANNICA, ARISTOTLE (1952).

5. Rokes, An Analysis of Property Valuation Systems Under Eminent Domain, Occasional paper No. 5, Bureau of Bus. & Eco. Research, Mont. State Univ. p. 8 (Jan. 1961).

and given the term *dominium eminens* (eminent domain).[6] Hugo Grotius, the Dutch jurist and originator of the term declared:

> . . . the property of subjects is under the eminent domain of the state, so that the state or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over property of others, but for the end of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. *But it is to be added that when this is done, the state is bound to make good the loss to those who lose their property* . . .[7] [Emphasis added.]

Over 340 years later the definitions of our courts will not materially differ from the version of Grotius. Acknowledging that the general use of the term has been constant since its defined birth, the true significance of its *meaning* comes from a review of its *application* in terms of power and philosophy of existence.

It has been said that the state's power of eminent domain is a reserved right "attached to every man's land"[8] recognizing "that the state might resume deminion over the property whenever the interest of the public or the welfare of the state make it necessary."[9] Those courts who subscribed to this theory believed that the state had original and absolute ownership of all property held by individuals, and the individual's possession of the property was subject to a continuous reservation that the sovereign might resume possession any time the necessities of the public so deemed. Since the ultimate power of the sovereign came from the public, the repossession of the land was only a reversion to the original owners. Several states adopted this interpretation in their courts[10] and the same concept can be found in constitutional phraseology.[11]

6. 1 NICHOLS, THE LAW OF EMINENT DOMAIN §1.12(1) (3d ed. Sackman & VanBrunt 1950).
7. *Ibid.*
8. Todd v. Austin, 34 Conn. 78, 87 (1867).
9. Haig v. Wateree Power Co., 119 S.C. 319, 112 S.E. 55, 57 (1921).
10. Walker v. Gatlin, 12 Fla. 9 (1867); Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N.E. 465 (1927); Shelton v. Shelton, 225 S.C. 502, 83 S.E.2d 176 (1954).
11. S.C. Const. art. XIV, §3 (1895); N.Y. Const. art. 1, §10 (1894); Wis. Const. art. IX §3 (1848).

This philosophy would seem to break down, however, when new states are created *after* the land is acquired by individuals, as was the case in the transition from colonies to states. Since eminent domain has the power over all personal and private property,[12] the ownership or right of repossession over tangibles and intangibles not yet in existence would seem not to support a theory of the sovereign's prior ownership.

Today, however, the prevailing view is that the power of eminent domain is an attribute of the sovereign "as a necessary and inseparable part thereof."[13] Most courts feel this interpretation emerges as a political necessity and needs no additional justification.[14] The concept of sovereignty has also been supported by the principles of natural law: granted that the sovereign does, indeed, have the power of eminent domain as a sovereign right, yet its power is subject to a reciprocal inherent individual right vested with each individual which requires the recognition of compensating the owner for property taken.[15]

It is interesting to note that the term "eminent domain" was a phrase not known to English law as we understand its usage. The doctrine as expressed in England and Canada was applied only in the exercise of the sovereign to enter lands for the defense of the realm.[16] The actual phrase "eminent domain" as understood in English law was the ownership or dominion of an independent sovereign over the territories of his sovereignty, by virtue of which no other sovereign could exercise jurisdiction.[17] The only technical

12. Bronx Chamber of Commerce v. Fullen, 174 Misc. 524, 21 N.Y.S. 2d 474 (1940); Ellis v. Ohio Turnpike Comm'n, 162 Ohio St. 86, 120 N.E.2d 719 (1954).

13. People v. Superior Court of Los Angeles Co., 47 Cal. App.2d 393, 118 P.2d 47, 49 (1941).

14. Shoemaker v. United States, 147 U.S. 282, 37 L.Ed. 170 (1892); Kohl v. United States, 96 U.S. 367, 23 L.Ed. 449 (1875); Hoffman v. Stevens, 177 F. Supp. 898 (M.D. Pa. 1959); Tinnerholm v. State, 179 N.Y.S.2d 582 (1958); Atkinson v. Carolina P. & L. Co., 239 S.C. 150, 121 S.E.2d 743 (1961); Riley v. State H'wy Dept., 238 S.C. 19, 118 S.E.2d 809 (1961).

15. Young v. McKenzie, 3 Ga. 31 (1847); Henery v. Dubuque R. Co., 10 Iowa 540 (1860); Sinnickson v. Johnson, 17 N.J.L. 129 (1839); Gardner v. Village of Newburg, 2 Johns Ch. R. 162 (N.Y. 1816). See Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS.L.REV. 67 (1931); Lenhoff, *Development of the Concept of Eminent Domain*, 42 COL.L.REV. 598 (1942).

16. See George v. Consolidated Lighting Co., 87 Vt. 411, 89 Atl. 635, 637 (1914).

17. 1 NICHOLS, *op cit. supra* note 6, §1.12(3).

term approximating "eminent domain" as we understand the term is "compulsory powers." These powers are granted by acts of Parliament to enable municipal and other corporations to take property for their use.[18] Although this power, in theory, established a form of eminent domain by the time of the American Revolution, the limitation for taking private property as understood in this country has never been recognized in English law.[19] It must be remembered in any comparative analysis of American and English jurisprudence, that England is not bound by a constitution. Acts of Parliament are construed by the courts only in their *meaning* whereas acts by Congress or state legislatures are scrutinized for their *constitutionality.*

As far as the necessity of eminent domain powers were concerned in the American colonies, the appropriation of property for public use was primarily limited to the establishment of roads, dams, or grist mills. Obviously, the land in most instances was unimproved, and consequently, no duty was recognized to compensate the owner for any loss.[20] Because many colonial charters reserved rights for such improvements as highways when land was granted, litigation seldom resulted from such takings.[21] Eventually, however, as the power was exercised more frequently, compensation for the property taken was recognized in all the colonies except one — South Carolina. Long after the Revolution, South Carolina not only appropriated private property for highways without compensation, but also used such materials from adjoining land as was necessary for construction on strictly a *gratis* basis.[22]

Although the colonies exercised eminent domain power for some private uses and had statutes authorizing such takings

18. RANDOLPH, THE LAW OF EMINENT DOMAIN 7 (1st ed. 1894).
19. 1 NICHOLS, *op cit. supra* note 6, §1.21(5). See also Welch v. T.V.A., 108 F.2d 95 (6th Cir. 1939).
20. 1 NICHOLS, *op. cit. supra* note 6, §§1.22(1)-(14).
21. For a historical review see State v. Hudson Co. Bd., 55 N.J.L. 88, 25 Atl. 322 (1892).
22. State v. Dawson, 3 Hill 100, 102 (S.C. 1836) "Until this question was gravely made in this case, I had supposed it was a question well settled in the law of this State, that the Legislature had the power to order roads to be opened, and to use so much timber, earth, or rock, as was necessary to keep the roads in repair; and to do this contrary to the will of the owner, and without making previous compensation." The court permitted the taking, however, based on precedent and that the power of eminent domain "is a tacit condition of every grant made in the State." 3 Hill at 105.

for mills[23] and roads,[24] the obligation to make compensation was recognized as a moral obligation by all colonial governments, except South Carolina, by the time of Revere's ride.

It was assumed that when the colonies shed the Union Jack for the Stars and Stripes, their respective status as states included the sovereign powers previously reserved to the King and Parliament. Blazing the comparatively virgin path of democracy, the eminent domain powers of the sovereign were actually a reservation of power in the hands of the people who in turn, spoke through the authority of the legislature.[25] When new states joined the Union, they automatically obtained the same sovereign power subject only to the constitutional prohibitions they desired to impose in the formation of their procedural and substantive law.[26]

Since it was acknowledged that eminent domain powers were absolute, no constitutional recognition was necessary. But as an unlimited power, imposed limitations were deemed necessary; especially in a nation fresh from the battle fought in the name of individual rights. The limitations imposed on eminent domain powers found in the Constitution of the United States and the several state constitutions are chiefly limited to the restrictions (1) that no person shall be deprived of his life, liberty, or property without due process and (2) that private property shall not be taken for public use without just compensation.

Accordingly, the fifth amendment to the Constitution of the United States[27] limits eminent domain powers; it in no way confers powers. In this case it is a limitation on the powers of the United States only and not on the states.[28] It

23. See Head v. Amoskeag Mfg. Co., 113 U.S. 9, 28 L.Ed. 889 (1884).
24. See Matter of Hickman, 4 Harr. 580 (Del. 1847); Robinson v. Swope, 12 Bush 21 (Ky. 1876); Taylor v. Porter, 4 Hill 142 (N.Y. 1843).
25. Dartmouth College v. Woodward, 4 U.S. 518, 4 L.Ed. 629 (1819). See also Munn v. Illinois, 94 U.S. 113, 24 L.Ed. 77 (1877) "When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance of their government. They retained for the purposes of government all the powers of the British Parliament and through their constitution or other forms of social compact undertook to give practical effect to such as they deemed necessary for the common good and security of life and prosperity." 94 U.S. at 124.
26. Cincinnati v. Louisville R. R., 223 U.S. 390, 56 L.Ed. 481 (1911); Coyle v. Oklahoma, 221 U.S. 559, 55 L.Ed. 853 (1910).
27. U.S. CONST. amend. V: ". . . nor shall private property be taken for public use, without just compensation."
28. Winous Point Shooting Club v. Caspersen, 193 U.S. 189, 48 L.Ed. 675 (1903); General Box Co. v. United States, 107 F. Supp. (W.D. La. 1952).

is generally recognized that the fourteenth amendment prohibits the states from authorizing the taking of private property for private use, or without compensation under the "due process" interpretation.[29] Similar provisions appear in every state constitution, except North Carolina and New Hampshire.[30] These states, however, are bound to award compensation for private property taken for public use under the inclusiveness of the fourteenth amendment.[31]

Through such judicial reasoning, cases concerning the constitutional powers must be determined on whether or not some constitutional provision has been violated, rather than questioning the sovereign authority.[32] It should be emphasized that the constitutional provisions are not in any way to be interpreted as a grant of authority, since the power of the legislature (i.e., the people) is unconditional; the constitutional provisions are, consequently, only limitations.[33]

Thus, the sovereign acting through its legislature may determine when the exercise of the eminent domain power is necessary,[34] what property is to be taken,[35] the extent of the taking,[36] and the mode of acquisition.[37] Accordingly, the sovereign may delegate the power of eminent domain to various administrative agencies of the sovereign as well as to public and private corporations, who, in turn, have the

29. U.S. CONST. amend. XIV, §1: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . ." See Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 41 L.Ed. 399 (1896); Missouri Pac. Ry. v. Nebraska, 164 U.S. 403, 41 L.Ed. 489 (1896); Chicago, Burlington & Quincy Ry. v. Chicago, 166 U.S. 226, 41 L.Ed. 979 (1867).

30. 1 NICHOLS, *op. cit. supra* note 6, §1.3.

31. Chicago, Burlington & Quincy Ry. v. Chicago, 166 U.S. 226, 41 L.Ed. 979 (1867).

32. Dobbins v. Los Angeles, 195 U.S. 223, 49 L.Ed. 169 (1904); Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 46 L.Ed. 679 (1902).

33. Munn v. Illinois, 94 U.S. 113, 24 L.Ed. 77 (1877). See 2 STORY, COMMENTARIES OF THE CONSTITUTION §1789 n. a (5th ed. 1891).

34. Rindge Co. v. Los Angeles Co., 262 U.S. 700, 67 L.Ed. 1186 (1923), *affirming* 53 Cal. App. 166, 200 Pac. 27 (1921); United States v. 4,450.72 Acres of Land, 27 F. Supp. 167 (D.C. Minn. 1939); Bergen County v. S. Goldberg & Co., 76 N.J. Super. 524, 185 A.2d 38 (1962).

35. Western Union Tel. Co. v. Louisville & N. R.R., 258 U.S. 13, 66 L.Ed. 437 (1922); State v. McCook, 109 Conn. 621, 147 Atl. 126 (1929); Town of Morgan v. Hutton & Bourbannais, 215 N.C. 531, 112 S.E.2d 111 (1960).

36. Maiatico v. United States, 302 F.2d 880 (D.C. Cir. 1962); Whelan v. Johnston, 192 Miss. 673, 6 So.2d 300 (1942); Riggs v. Springfield, 344 Mo. 420, 126 S.W.2d 1144 (1939); Bookhart v. Central Elec. Power Co-op., 222 S.C. 289, 72 S.E.2d 576 (1952).

37. United States v. 9.94 Acres of Land, 51 F.Supp. 478 (E.D.S.C. 1943); Southern Ry. v. Fitzpatrick, 129 Va. 246, 105 S.E. 663 (1921).

power to make determinations as to exercise of the power.[38] Although this power can be delegated, its absolute character precludes any surrender and any statutory attempt shall be held invalid.[39] The power of eminent domain has the same longevity as the state itself.

The federal government did not assert this right in its own name until the landmark case of *Kohl v. United States* in 1875.[40] Since that time, the federal government has used its own courts for appropriating property located in the District of Columbia,[41] the territories,[42] and the states.[43]

OTHER GOVERNMENTAL POWERS

To understand fully what eminent domain is, it is essential to determine what it is not. Other government powers exist which are also sovereign powers or grants of authority that may be confused with eminent domain characteristics.

A. POLICE POWER

The basic distinguishing feature between the police power and the power of eminent domain is in the method of reaching their intended purpose. Police power *regulates* private property to prevent its use in such a manner that is detrimental to the public. Eminent domain *takes* private property because of a use needed by the public or on the public's behalf. Both powers are oriented in the public's behalf as determined by the legislature, but police power is basically concerned with restraint and compulsion of the use of prop-

38. Joslin Mfg. Co. v. Providence, 262 U.S. 668, 67 L.Ed. 1167 (1922), *affirming* 44 R.I. 31, 114 Atl. 185 (1921); Riden v. Philadelphia, B. & W. R.R., 182 Md. 336, 35 A.2d 99 (1943); Bronx Chamber of Commerce v. Fullen, 174 Misc. 524, 21 N.Y.S.2d 474 (1940); Belton v. Wateree Power Co., 123 S.C. 291, 115 S.E.2d 587 (1922).

39. West River Bridge Co. v. Dix, 6 How. 507, 12 L.Ed. 535 (1848); *In re* Southern Blvd. R.R., 146 N.Y. 352, 40 N.E. 1000 (1895); City of Milwaukee v. Schomberg, 261 Wis. 166, 52 N.W.2d 151 (1952); Bradley v. City Council of Greenville, 212 S.C. 389, 46 S.E.2d 291 (1948).

40. 91 U.S. 367, 23 L.Ed. 449 (1875). In 1871 the State of Michigan was denied the power to condemn for the United States. People *ex rel.* Trombley v. Humprey, 23 Mich. 471 (1871).

41. Shoemaker v. United States, 147 U.S. 282, 37 L.Ed. 170 (1892); United States v. Great Falls Mfg. Co., 112 U.S. 645, 28 L.Ed. 846 (1884).

42. Cincinnati Soap Co. v. United States, 301 U.S. 308, 81 L.Ed. 1122 (1936); Cherokee Nation v. Southern Kansas R.R., 135 U.S. 641, 34 L.Ed. 295 (1890), *reversing* 33 Fed. 900 (W.D. Ark. 1888).

43. Berman v. Parker, 348 U.S. 26, 99 L.Ed. 27 (1954); Kohl v. United States, 91 U.S. 367, 23 L.Ed. 449 (1875).

erty while the power of eminent domain terminates the use of the property by its owner.[44]

Although examples of police powers can be given which seem to protect economic interests, it is generally considered to be a valid exercise of governmental authority on behalf of health, morals, and safety in the name of the public welfare. It can be well imagined how financially burdensome police powers might become, but there is no obligation of compensation imposed on the sovereign.

Basically, then, the exercise of police power by the sovereign impairs the owner's property rights because the free exercise of these rights is detrimental to the public interest. No compensation is required because such use is expected to be followed in accordance with the public will. Such injury will be recognized as *damnum absque injuria,*[45] or that the "injury" is a benefit as the property owner receives the profit for which the regulation was intended.[46]

Although a proper exercise of the power does not require compensation, there may be a taking in the constitutional sense for which compensation will be required. This right to compensation does not result because of a relinquishment of ownership, but because of an impairment of the value of the land or actual destruction of the property.[47] If ever an exercise of police power should become so regulative as to effectively deprive a person of his property, the result would be a legal limbo — both an invalid exercise of police power, since it is unreasonable and goes beyond proper police power,[48] and an invalid exercise of eminent domain, since no provision was made for compensation.[49]

44. Chicago Ry. Co. v. Drainage Comm'rs, 200 U.S. 561, 50 L.Ed. 596 (1906). See KUCERA, EMINENT DOMAIN VERSUS POLICE POWER — A COMMON MISCONCEPTION, Institute of Eminent Domain 1-36 (1959).

45. City of Clayton v. Nemours, 353 Mo. 61, 182 S.W.2d 57 (1944), *cert. den.*, 323 U.S. 684, 89 L.Ed. 554 (1944).

46. Barbier v. Connolly, 113 U.S. 27, 28 L.Ed. 923 (1885); Franco-Italian Packing Co. v. United States, 128 F.Supp. 408 (Ct. Cl. 1955); Cities Service Oil Co. v. City of New York, 5 N.Y.2d 110, 154 N.E.2d 814 (1958).

47. Symonds v. Bucklin, 197 F.Supp. 682 (D.C. Md. 1961); House v. Los Angeles Co. Flood Control Dist., 25 Cal. 2d 384, 153 P.2d 950 (1945); Phillips Petroleum Co. v. Omaha, 171 Neb. 457, 106 N.W.2d 727 (1960).

48. Treigle v. Acme Homestead Ass'n, 297 U.S. 189, 80 L.Ed. 575 (1935); Mugler v. Kansas, 123 U.S. 623, 31 L.Ed. 205 (1887); Congressional School of Areo v. State Roads Comm'n, 218 Md. 236, 146 A.2d 558 (1958).

49. Stengel v. Crandon, 156 Fla. 592, 23 So.2d 835 (1946); Arvern Bay Constn. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938).

Although it has been held that police power was reserved to the states by the first ten amendments to the Constitution,[50] it is now accepted that the Federal Government may exercise such reasonable police powers as it deems necessary, provided it is acting within the proper exercise of its powers granted by the constitution in the jurisdictions which are within its sphere of control.[51] If at any time such exercise exceeds reasonableness and becomes so arbitrary as to affect a taking, compensation will be required.[52]

Police powers can be broad and inclusive, emulating as much power in terms of control as any eminent domain proceedings.[53] For example, building codes and zoning ordinances can be tremendously restrictive and cause extreme financial loss, but are, in fact, a valid exercise of police power requiring no compensation.[54] Billboards have been prohibited in the name of public safety,[55] trade restricted in the name of public health,[56] public service corporation rates fixed in the name of public welfare,[57] property forfeited and destroyed when held illegally and against public interests,[58] property,

50. Patterson v. Kentucky, 97 U.S. 501, 24 L.Ed. 1115 (1878).

51. In the District of Columbia: District of Columbia v. Brooke, 214 U.S. 138, 53 L.Ed. 941 (1909). In public lands: Utah Power & Light Co. v. United States, 243 U.S. 389, 61 L.Ed. 791 (1917). In the territories: Camfield v. United States, 167 U.S. 518, 42 L.Ed. 260 (1897).

52. Monongahela Navigation Co. v. United States, 148 U.S. 312, 37 L.Ed. 463 (1893).

53. As Justice Holmes said in a famous dissenting opinion: "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. Property must not be taken without compensation, but with the help of a phrase [i.e., police power] some property may be taken or destroyed for public use without paying for it, if you do not take too much. When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on." Springer v. Government of Philippine Islands, 277 U.S. 189, 72 L.Ed. 845, 852 (1928).

54. Armstrong v. Goyco, 29 F.2d 900 (1st cir. 1928); MacEwen v. City of New Rochelle, 149 Misc. 251, 267 N.Y.S. 36 (1936); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955); Weber City Sanitation Comm'n v. Craft, 196 Va. 1140, 87 S.E.2d 153 (1955).

55. *In re* Wilshire, 103 Fed. 620 (S.D. Cal. 1900); Gunning System v. Buffalo, 62 App. Div. 497, 71 N.Y.S. 155 (1901).

56. Northwestern Laundry v. Des Moines, 239 U.S. 486, 60 L.Ed. 396 (1916); Reinman v. Little Rock, 237 U.S. 171, 59 L.Ed. 900 (1915).

57. Munn v. Illinois, 94 U.S. 113, 24 L.Ed. 77 (1877).

58. Boyd v. United States, 116 U.S. 616, 29 L.Ed. 746 (1886); Associate Inv. Co. v. United States, 220 F.2d 885 (1955); Police Commr's v. Wagner, 93 Md. 182, 48 Atl. 455 (1901).

such as cattle[59] and trees,[60] eradicated when diseased, and even houses demolished if the condition endangers public safety.[61] All these measures are examples of valid implementation of police power without any need for compensation.

The resemblance between police power and eminent domain is essentially in the recognition of the superior right of the public over the individual property owner. As a general rule under police power, the property is not appropriated to another use but is destroyed, the value impaired, or use restricted, and no compensation is required, because its present use is in defiance of existing statutes and ordinances. Eminent domain exercises a superior right over the property by taking it, and since such action or loss was not because of its present use, compensation will be required.

B. TAXATION

Taxation is a sovereign power, which exacts a ratable portion of the produce of individual citizens and labor for the support of government in the administration of its laws, and the means of continuing the functions of the state.[62] There is, however, a marked difference between the sovereign powers of eminent domain and taxation. Both powers exact a forced contribution from the individual on behalf of the public, but the portion of the public affected differentiates the powers.

Eminent domain operates upon the individual property owner with no reference to the amount of value exacted from any other segment of the community; taxation is specifically directed toward a community or a class of persons in the community by some basic rule of apportionment.[63] The similarity terminates with the forced contribution aspect. The forced contribution of taxation must be in relation to the rest of the public, whereas, that of eminent domain is above and beyond any apportioned share of governmental burden and for a specific use, not a general use as in taxation.[64]

59. Dunbar v. Augusta, 90 Ga. 330, 17 S.E. 907 (1892); New Orleans v. Charonleau, 121 La. 890, 46 So. 911 (1908).
60. State v. Main, 69 Conn. 123, 37 Atl. 80 (1897).
61. Lawton v. Steele, 152 U.S. 133, 38 L.Ed. 385 (1894).
62. Gibbons v. Ogden, 9 Wheat 1, 6 L.Ed. 23 (1824); New London v. Miller, 60 Conn. 112, 22 Atl. 499 (1891).
63. County of Mobile v. Kimball, 102 U.S. 691, 26 L.Ed. 238 (1880).
64. Beeland Wholesale Co. v. Kaufman, 234 Ala. 249, 174 So. 516 (1937); Commonwealth v. Perkins, 342 Pa. 529, 21 A.2d 45 (1941), *affirming* Perkins v. Commonwealth of Pa., 314 U.S. 586, 86 L.Ed. 473 (1941).

Even with these basic distinguishing features, there has been some controversy and confusion between eminent domain and a particular species of taxation known as special assessment or betterments.[65] This form of taxation does have the characteristic of being over and above the general ratable share paid by the public.

Special assessment is an assessment for a part or the whole cost of a local improvement upon property to be benefited by the improvement. Acts by the legislature requiring such assessment have been held constitutional;[66] even if the cost is exceeded by the assessment, it will not be termed an invalid exercise of authority if it is done by equitable methods.[67] If it can be shown, however, that the special assessment is in excess of benefits conferred by the improvement, a different result may occur.[68] Taxes, assessment, and levy are frequently used interchangeably[69] though, properly speaking, assessment does not include the levy of taxes.[70] Assessment implies taxes, but one of a particular kind. Taxes are levied without reference to any one benefit; an assessment is levied only on something specific which is the subject of the benefit. It is the duty of the owners receiving these benefits to repay the cost according to the measure or portion of benefit received.[71]

Even though the apportionment is reduced to only those people receiving the benefits, it still retains this element which separates it from eminent domain which adheres to no degree of apportionment. Some states have in the past felt that this attention to certain property in special assessment was a form of eminent domain.[72] Illinois had to change a tax provision of its constitution from one of uniform taxation to a provision that would allow a special assessment to

65. See Fallbrook Irrig. Dist. v. Bradley, 164 U.S. 112, 41 L.Ed. 369 (1896).
66. Philadelphia, B. & W. R.R. v. Hazen *et al.*, 116 F.2d 543 (D.C. Cir. 1940); Georgia Power Co. v. City of Decatur, 179 Ga. 471, 176 S.E. 494 (1934).
67. Donaldson's Heirs v. City of New Orleans, 166 La. 1059, 118 So. 134 (1927).
68. See Barnes v. Dyer, 56 Vt. 469 (1884); *cf.*, Mill's Mill v. Hawkins, 232 S.C. 515, 103 S.E.2d 14 (1958).
69. Huyler *et al.* v. Huyler's *et al.*, 44 N.Y.S.2d 255 (1943).
70. Commissioner of Internal Revenue v. Patrick Cudaly Family Co., 102 F.2d 930 (7th Cir. 1939).
71. *In re* Walker River Irrig. Dist., 44 Nev. 321, 195 Pac. 327 (1921).
72. *E.g.*, Philadelphia v. Penn. Hospital, 143 Pa. St. 367, 22 Atl. 744 (1891); State v. City Council, 12 Rich. 702 (S.C. 1860).

come under the banner of taxation and not eminent domain.[73]

Today, however, the distinction is recognized that taxation, whether through general or special assessment, is the respective apportioned contribution of the public burden of governmental services; whereas, eminent domain causes the individual to contribute to the public over and above his apportioned contribution which demands compensation for the loss of his property.

PROPERTY SUBJECT TO EMINENT DOMAIN POWERS

One of the first considerations of any study of eminent domain is to determine the inclusiveness of the word "property" in a proceeding to acquire private property for public use in its status as the *res*. By general definition the power extends to *all* property within the sovereign's jurisdiction. Therefore, it seems to logically follow that the sovereign's authority extends over all private property in its respective jurisdiction.[74] Real property, then, is subject to the power including all rights and interests such as easements,[75] riparian rights,[76] buildings;[77] in short, all general real estate. Such a definition will also include personal property,[78] intangibles and incorporeal rights such as choses in action,[79] patent rights,[80] franchises,[81] or any form of contract.

"Property," then, can be said to include every kind of right or interest capable of being enjoyed and where it is feasible to determine a monetary value on the property

73. Ill. Const. art. IX, §2.5 (1848) provided for equality and uniformity as "indispensable to all taxation where general or local." See City of Chicago v. Larned, 34 Ill. 203, 276 (1864). The Const. of 1870 art. IX, §2.5 eliminated any reference to restrictive provisions of uniformity in all municipal taxation and provided the General Assembly with the power of delegating special assessment, art. IX, §9. See White v. City of Bloomington, 94 Ill. 604 (1880).

74. Bronx Chamber of Commerce v. Fullen, 174 Misc. 524, 21 N.Y.S.2d 474 (1940); Ellis v. Turnpike Comm'n, 162 Ohio St. 86, 120 N.E.2d 719 (1954).

75. Beals v. Inhabitants of Brookline, 245 Mass. 20, 139 N.E. 492 (1923); Monogahela Power Co. v. Shackelford, 137 W.Va. 441, 73 S.E.2d 809 (1952).

76. Yates v. Milwaukee, 10 Wall 497, 19 L.Ed. 984 (1870); Bino v. City of Hurley, 273 Wis. 10, 76 N.W.2d 571 (1956).

77. *In re* Housing Authority of City of Charlotte, 223 N.C. 649, 65 S.E.2d 761 (1951).

78. Daily v. United States, 90 F. Supp. 699 (Ct. Cl. 1950); Illinois Cities Water Co. v. City of Mt. Vernon, 11 Ill. 547, 144 N.E.2d 729 (1957).

79. Cincinnati v. Louisville R.R., 223 U.S. 390, 56 L.Ed. 481 (1912).

80. James v. Campbell, 104 U.S. 356, 26 L.Ed. 786 (1882).

81. Greenwood v. Union Freight R.R., 105 U.S. 13, 26 L.Ed. 961 (1882); Brady v. Atlantic City, 53 N.J.Eq. 440, 32 Atl. 271 (1895).

taken.[82] Money itself, however, does not seem to be subject to the power of eminent domain for the states; at best it would seem to be only a forced loan even though the need may well be a public one.[83] The federal government, however, possesses the power of eminent domain over money, this power having been expressly or impliedly derived from the Constitution.[84] It has been held that since the Federal government has the control of the finance and currency, it has the power to take gold certificates by eminent domain proceedings.[85]

Rights that cannot be appropriated under eminent domain, would necessarily be those which have no measurable monetary value; the right to vote would be such an exemption. In an Ohio case it was held that where a statute required the consent of abutting property owners before a railway could be constructed on a street, a railway company authorized to exercise eminent domain could not condemn the consent of objecting abutting property owners.[86]

Personal services needed by the sovereign in behalf of the administration of justice or for the defense of the nation have been compared to a form of eminent domain over the person instead of property. Although it is necessary to provide compensation for the services, the amount given is more a matter of policy than a constitutional obligation.[87]

The compensation that is provided here is upon a different principle than the payment provided under eminent domain: people compelled to serve are usually paid all alike, regardless of their time or services.[88] Contrary positions have

82. United States v. 44 Acres of land in Berkeley County, 121 F.Supp. 862 (E.D.S.C. 1954); Rhyne v. Town of Mt. Holly, 251 N.C. 521, 112 S.E.2d 40 (1960); State *ex rel.* Bruestte v. Rich, 159 Ohio St. 1, 110 N.E.2d 778 (1953). For cases holding that the payment must be in money see Schwartz v. City of New London, 20 Conn. Supp. 21, 120 A.2d 84 (1955); Hellen v. Medford, 188 Mass. 42, 73 N.E. 1070 (1905); Railroad Co. v. Halstead, 7 W.Va. 301 (1874).

83. Emery v. San Francisco Gas Co., 28 Cal. 345 (1865).

84. Discussed in Kohl v. United States, 91 U.S. 367, 23 L.Ed. 449 (1875). See United States v. Champbell, 5 F. Supp. 156 (S.D.N.Y. 1933); 82 PA.L.REV. 395 (1934).

85. *Ibid.*; see also Nortz v. United States, 294 U.S. 317, 79 L.Ed. 907 (1934).

86. Hamilton, etc. Tracton Co. v. Parish, 67 Ohio St. 181, 65 N.E. 1011 (1902).

87. Witnesses to attend court and testify without fees: *Ex parte* Dement, 53 Ala. 389 (1875); State v. Henley, 98 Tenn. 665, 41 S.W. 352 (1897).

88. An expert was compelled to attend court and answer hypothetical questions upon the same fee as given witnesses: Dixon v. People, 168 Ill. 179, 48 N.E. 108 (1897).

been taken,[89] but the important factor differentiating the two types of powers is the feature of uniformity; if there were a statute applying a uniform price for property, regardless of individual value, it would doubtlessly be found unconstitutional.[90]

All property subject to individual ownership is within the purview of eminent domain powers within the jurisdictions of the sovereign or to whom the sovereign has delegated the authority.[91] By the same token, public property is also subject to eminent domain by the sovereign itself.[92] there is some question, obviously, whether or not a condemnor who has been delegated the power can exercise eminent domain over public land.[93]

Since this power over all property is essential to the public welfare, it will continue without any impairment or extreme modification,[94] and, as far as the property itself is concerned, there can be nothing in the title that will exempt the property from being subject to eminent domain. It is a power that lies dormant until legislative action determines its exercise over that property.[95]

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89. United States v. Howe, 26 Fed. Cas. 394 (No. 15404a) (W.D. Ark. 1881).

90. Derby Heights, Inc. v. Gantt Water & Sewer Dist., 237 S.C. 144, 116 S.E.2d 13, 17 (1960).

91. *E.g.*, Fed. Govt.: Brooks v. United States, 119 F.2d 636 (9th Cir. 1941); *cert. den.*, 313 U.S. 594, 85 L.Ed. 1548 (1941); State: Gourdine's Ex'rs v. Davis, 1 Bailey 469 (S.C. 1830); Municipality: Paris Mountain Water Co. v. City of Greenville, 105 S.C. 180, 89 S.E. 669 (1916).

92. United States v. 929.70 acres of land, 205 F.Supp. 456 (C.D.S.D. 1962); Elberton Southern R. v. State H'wy Dept., 211 Ga. 838, 89 S.E.2d 645 (1955); Riley v. S.C. H'wy Dept., 238 S.C. 19, 118 S.E.2d 809 (1961).

93. United States v. Southern Power Co., 31 F.2d 52 (4th Cir. 1929); Board of Comm'rs v. Holliday, 182 S.C. 510, 189 S.E. 885 (1937); Twin City Power Co. v. Savannah River Elec. Co., 163 S.C. 438, 161 S.E. 750 (1930).

94. State of Georgia v. City of Chattanooga, Tenn., 264 U.S. 472, 68 L.Ed. 796 (1923); Trustees of Phillips Exeter Academy v. Exeter, 90 N.H. 472, 11 A.2d 569 (1940); Bradley v. City Council of Greenville, 212 S.C. 389, 46 S.E.2d 291 (1948); *But see* Bailey v. Housing Authority of Bainbridge, 217 Ga. 790, 107 S.E.2d 812 (1959) and Allen v. City Council of Augusta, 215 Ga. 778, 113 S.E.2d (1960). A constitutional amendment may constitute a voluntary surrender within specified limitations.

95. Rindge Co. v. Los Angeles Co., 262 U.S. 700, 67 L.Ed. 1186 (1923), *affirming* 53 Cal. App. 166, 200 Pac. 27 (1921); Western Union Tel. Co. v. Louisville & N. R., 258 U.S. 13, 66 L.Ed. 437 (1922); Maiatico v. United States, 302 F.2d 880 (D.C. Cir. 1962).

THE TAKING UNDER EMINENT DOMAIN

The "taking" of property by eminent domain proceedings has been said to be the basic reason for the Bill of Rights and similar provisions in state constitutions which prohibit the acquisition of private property for private re-use.[96] These constitutional provisions have been interpreted broadly and it has been held that property can be taken without the formal devesting of title from the owner.[97] Generally, any limitation which causes ". . . any destruction, restriction or interruption of the common and necessary use and enjoyment of the property of a person for a public purpose constitutes a taking thereof"[98] and, consequently, will necessitate compensation.

As compensation must be paid to the owner for the taking of property that is capable of having a monetary value,[99] a "taking" in land would be where an actual invasion impaired or partially destroyed the land even though not taken in fact. Courts will consider such an invasion sufficient to require compensation, as this is, in essence, eminent domain.[100] Because a monetary value must be ascertainable, neither a business nor its profits can be acquired by eminent domain since they are speculative and depend on variances aside from the use to which the land may be put.[101]

The strict interpretation of a "taking" is the actual physical invasion and appropriation of the property,[102] or a permanent ouster of the owner.[103] The prevailing view, however, holds that any substantial interference with an individual's property which destroys, decreases the market value, or impairs

96. 2 NICHOLS, THE LAW OF EMINENT DOMAIN §6.1(1) (3d ed. Sackman & VanBrunt (1950).

97. United States v. Cress, 243 U.S. 316, 61 L.Ed. 746 (1916); United States v. Finn, 127 F. Supp. 158 (S.D. Cal. 1954); Pennsylvania R. v. Sagamore Coal Co., 281 Pa. 233, 126 Atl. 386 (1924), *cert. den.*, 267 U.S. 592, 69 L.Ed. 803 (1924).

98. Morrison v. Clackamus County, 141 Or. 564, 18 P.2d 814, 817 (1933).

99. United States v. 44 acres of land in Berkeley County, 121 F.Supp. 862 (E.D.S.C. 1954); Rhyne v. Town of Mt. Holly, 251 N.C. 521, 112 S.E.2d 40 (1960); State *ex rel.* Bruestte v. Rich, 159 Ohio St. 1, 110 N.E.2d 778 (1953).

100. Boynton v. State of N.Y., 28 Misc.2d 12, 215 N.Y.S.2d 953 (1961).

101. *Ibid.* See also United Fuel Gas Co. v. Railroad Commission, 78 U.S. 300, 73 L.Ed. 390 (1928).

102. New York Tel. Co. v. United States, 136 F.2d 87 (2d Cir. 1943); Horn v. Chicago, 403 Ill. 549, 87 N.E.2d 642 (1949).

103. 11,000 acres of land v. United States, 152 F.2d 566 (5th Cir. 1945), *cert. den.*, 328 U.S. 835, 90 L.Ed. 1611 (1945).

the free use and enjoyment of such property to a marked degree will be a taking within the constitutional expression, even though the title or possession of the property remains undisturbed.[104]

Damage to property in the construction of public improvements has had a rather callous history from the viewpoint of the property owner.[105] Courts have held that if the sovereign inflicts injury on private property through a valid exercise of eminent domain there will be no liability for compensation unless the injury was such as to deprive the owner of the use and possession of his land or there was want of reasonable care or skill.[106] This reasoning leaves a large void, and is simply property damage without compensation. It is interesting to note that the same courts *would* award compensation to property owners if such damages were caused by private corporations regardless of skill or care, providing that such damages were actionable at common law.[107]

Not until 1870 was any remedial action taken by a state to amend its constitution to protect property owners from such damages. Illinois amended its constitution to include the words "or damaged" to the phrase "property taken."[108] Other states followed suit and provided that private property should not be taken or damaged for public use without compensation.[109]

The next step, of course, was to define the "damage" clause to determine when compensation was due. The Supreme Court of Illinois, being the first state to judicially consider the question,[110] propounded a definition which has been followed by the majority of the states that requires such com-

104. North Counties H-E Co. v. United States, 70 F.Supp. 900 (Ct.Cl. 1947), Eller v. Bd. of Ed. of Buncombe Co., 242 N.C. 584, 89 S.E.2d 144 (1955); Gasque v. Conway, 194 S.C. 15, 81 S.E.2d 871 (1940).

105. See 2 NICHOLS, *op. cit. supra* note 89, §§6.38-6.45; Lenhoff, *Development of the Concept of Eminent Domain*, 42 COL.L.REV. 596 (1942);

106. Transportation Co. v. Chicago, 99 U.S. 635, 25 L.Ed. 336 (1878); DeBaker v. Southern Cal. Ry., 106 Cal. 257, 39 Pac. 610 (1895); *In re* Grade Crossing Comm'rs. of Buffalo, 210 N.Y. 32, 94 N.E. 188 (1911); City of Columbia v. Melton, 85 S.C. 558, 67 S.E. 902 (1910).

107. Baltimore & Potomac R.R. v. Fifth Baptist Church, 108 U.S. 317, 27 L.Ed. 739 (1883); Cogswell v. N.Y., N.H. & H. R.R., 103 N.Y. 10 (1886).

108. Ill. Const. art. II, §13 (1870).

109. NICHOLS, *op. cit. supra* note 89, §6.44 contains a list of states having such provisions.

110. Rigney v. Chicago, 102 Ill. 64 (1882).

pensation for damaged land.[111] This interpretation maintains that compensation is required when the property injury would be actionable at common law and when some actual interference occurs where special damage results over and above the damage sustained by the general public.[112] It is apparent that the multitude of types of damage necessitates that each case be determined on its own merits and particular facts, but it is universally agreed that the damage need not be limited to actual or direct physical injury.[113]

Today, then, the modern view protects the property owner from a loss by damage to property as well as by the taking of property when eminent domain powers are invoked. This has not in any way restricted the use of eminent domain, but it does permit a more equitable exercise of that power.

COMPENSATION UNDER EMINENT DOMAIN

A private property owner's right to compensation for property lost through eminent domain proceedings is a universally accepted constitutional guarantee as a natural by-product of our democratic way of life.[114] This right has been defined as "self executing," needing no legislative assistance for its enforcement.[115] The obligation of compensation to be paid by the state is, however, provided for in some manner in every state constitution except North Carolina.[116] The Constitution of the United States provides for it through the fifth[117]

111. *E.g.*, Montgomery v. Townsend, 80 Ala. 489, 2 So. 155 (1887); Pause v. Atlanta, 98 Ga. 92, 26 S.E. 489 (1896); Van DeVere v. Kansas City, 107 Mo. 83, 17 S.W. 695 (1891); Twenty-second Corp. v. Oregon R.R., 36 Utah 238, 103 Pac. 243 (1909); *cf.*, Owens v. S.C. H'wy Dept., 239 S.C. 44, 121 S.E.2d 240 (1961), S.C. Constitution recognizes no distinction between "taking" and "damaging."

112. *Ibid.* See also, Chicago v. Taylor, 125 U.S. 166, 31 L.Ed. 630 (1887); *cf.*, Louisville v. Hekemann, 161 Ky. 523, 171 S.W. 165 (1914) (city dump facilities); Oklahoma City v. Vetter, 72 Okl. 196, 179 Pac. 473 (1919) (hospital for contagious diseases); Lambert v. Norfolk, 108 Va. 259, 61 S.E. 776 (1908) (cemetery).

113. Pause v. Atlanta, 98 Ga. 92, 26 S. E. 489 (1896); Cook v. Salt Lake City, 48 Utah 58, 157 Pac. 643 (1916); Rice Hope Plantation v. S.C. Pub. Ser. Authority, 216 S.C. 500, 59 S.E.2d 132 (1950).

114. *E.g.*, Phelps v. United States, 274 U.S. 341, 71 L.Ed. 1083 (1926); County of Mohave v. Chamberlin, 78 Ariz. 422, 281 P.2d 128 (1955); Redevelopment Comm'n v. Security Nat'l Bank, 252 N.C. 595, 114 S.E.2d 688 (1960); Parrish v. Town of Yorkville, 96 S.C. 24, 79 S.E. 635 (1913).

115. Derby Heights, Inc. v. Gantt Water & Sewer Dist., 237 S.C. 144, 116 S.E.2d 13, 17 (1960).

116. 1 NICHOLS, THE LAW OF EMINENT DOMAIN §1.3 (3d ed. Sackman & VanBrunt 1950).

117. Cincinnati v. Louisville R.R., 223 U.S. 390, 56 L.Ed. 481 (1911).

and fourteenth[118] amendments. Further, this right is absolute, permitting no qualifications or conditions by the condemnor.[119]

Although it would seem obvious at first impression, it has been questioned whether or not the compensation awarded to the property owner must be in the medium of money. Such compensation as the right to use the improvement[120] or the substitution of other lands[121] has been held to be inadequate as compensation required. All courts who have considered the question agree that the compensation awarded must be in money,[122] and three state constitutions so provide.[123]

The troublesome point confronting the courts was the determination of what was proper compensation in terms of value. States have used such obviously flexible terms for guideposts as "just," "reasonable," or "adequate."[124] In an effort to establish plausible standards, different criteria has been submitted to cover the position of all parties, such as market value, value to the owner, and value to the buyer.[125] Another trio of standards offered is cost (or physical value of land and improvements), income (or economic relationship of the return that the property will probably earn to the price for which it will sell), and market value (or comparison of the property in question with recently sold property).[126]

118. Winous Point Shooting Club v. Caspersen, 193 U.S. 189, 48 L.Ed. 675 (1903), General Box Co. v. United States, 107 F.Supp. 981 (W.D.La. 1952).

119. Rosenbaum v. State Road Dept., 129 Fla. 723, 177 So. 220 (1937); Craig v. Dallas, 20 S.W.2d 154 (Tex. 1929). *But see* Laycock v. United States, 230 F.2d 848 (9th Cir. 1956). "Moreover, even if the principle of just compensation is involved, it still must be established that the United States has consented to be sued for the recovery of such compensation. The United States may withhold, withdraw, or condition that consent anyway it chooses." 230 F.2d at 850.

120. State v. King County Court, 77 Wash. 593, 138 Pac. 277 (1914).

121. Horn's Lessee v. Dorrance, 2 Dall. 304, 1 L.Ed. 391 (1795); Beveridge v. Lewis, 137 Cal. 619, 67 Pac. 1040 (1905); Groce v. Greenville Ry., 94 S.C. 199, 78 S.E. 888 (1913).

122. *E.g.*, Schwartz v. City of New London, 20 Conn. Supp. 21, 120 A.2d 84 (1955); Hellen v. Medford, 188 Mass. 42, 73 N.E. 1070 (1905); Matter of New York R., 28 Hun. 426 (N.Y. 1882); Railroad Co. v. Halstead, 7 W.Va. 301 (1874).

123. Ark. Const. art. XII, (1874) §9; Kan. Const. art. XII, (1859) §4; Vt. Const. art. I, (1793) §2.

124. *E.g.*, Sweet v. Rechel, 159 U.S. 380, 40 L.Ed. 188 (1895); Des Moines W.W. Laundry v. Des Moines, 197 Iowa 1082, 198 N.W. 486 (1924); Virginia R.R. v. Henery, 8 Nev. 165 (1813).

125. 1 ORGEL, VALUATION UNDER EMINENT DOMAIN §12 (2d ed. 1953).

126. ALLISON, THREE APPROACHES TO VALUE ON EMINENT DOMAIN, Institute of Eminent Domain (1961).

The ultimate goal is, of course, to establish a standard that will permit a fair return to the property owner considering all circumstances involving his property. Even though the term "market value" has inherent ambiguities which depend on the interpretation by the person employing the term (*e.g.*, an economist or a realtor), and when the sale took place (*e.g.*, in a boom or a depression), most courts have used this term as the best bases available to determine compensation.[127] It has been held, however, that the proposed use of the land which might enhance its value to the taker will not have a major significance in establishing the market value.[128]

It is important to note that compensation will not be limited just to the land *taken* regardless of the effect on the remaining land retained by the owner. Consequently, if the remaining land is diversely affected due to the appropriation of property for public use, "just compensation to which the owner is entitled includes the damages to the remainder of the tract resulting from the taking as well as the value of the land taken."[129]

Accordingly, the benefits the remaining land receives from the public use or improvement will also be considered when determining compensation awards. The theory of set-off was recognized as early as 1807 when a Massachusetts court declared in an eminent domain proceeding involving a road:

> The owner may suffer much greater damage [than just the value of the land taken] by the road depriving him of water or otherwise rendering the cultivation of his farm inconvenient and laborious; or it may happen that the new highway may essentially benefit his farm and

127. *E.g.*, Reed v. Ohio Ry., 126 Ill. 48, 17 N.E. 807 (1888) "The present market value of the land taken furnishes the true bases for determining the compensation to be paid the land owner for the land taken and appropriated to public use." 17 N.E. at 809; Matter of Sixth Ave. Elevated R.R., 265 App. Div. 200, 38 N.Y.S.2d 730 (1942) ". . . just compensation being required, the full and fair equivalent of the property taken is essential . . . the usual method of fixing such compensation is by ascertaining market value." 38 N.Y.S.2d at 737; Georgia Power Co. v. Mays, 137 Ga. 120, 72 S. E. 900 (1911) ". . . the nature and character of the property, its situation, its availability for different uses, and all the facts . . . may be taken into consideration, and from all of them the jury may arrive at what is the fair market value . . . ." at 72 S.E. 902; *see* also, 1 ORGEL, VALUATION UNDER EMINENT DOMAIN §§17-36 (2d ed. 1953).

128. United States v. Twin City Power Co., 350 U.S. 222, 100 L.Ed. 240 (1955); see Comment, 9 VAN.L.REV. 565 (1956).

129. Bauman v. Ross, 167 U.S. 548, 42 L.Ed. 270 (1896).

> that he may suffer very little or no injury by the location. The estimation [of compensation] ought, therefore, to be according to the damage which the owner will, in fact, sustain in his property by the opening of his road.[130]

The benefits received by the remaining land, however, must be related to its market value and not strictly to the necessities of the owner,[131] must arise from the creation of the improvement,[132] and should affect the particular parcel or tract of land from which the taking was made.[133] Thus benefits to separate independent parcels of land belonging to the property owner from whose land property was taken will not be considered in determining the effect on the market value.[134]

The concept of benefits being deducted from the compensation award would seem to support the basic philosophy of eminent domain; the power is employed for the benefit of the public, and the land taken, therefore, must be considered in the *total* scheme rather than as an isolated taking. The Supreme Court of the United States has supported this rationale, holding that the right guaranteed by the Fourteenth Amendment is that the owner will not be deprived of the *market value* of his property.[134a] Accordingly, this rule carried to its logical conclusion would permit no compensation when the owner receives in effect no damage because of the taking.[135] Discussion of fairness developed in the courts concerning a situation where a property owner whose land was taken and benefits deducted from his compensation as opposed to the property owners whose property was not taken and received the same benefits also developed in the courts. Courts have split on this ques-

130. Commonwealth v. Coombs, 2 Mass. 489 (1807). *Accord,* Mangles v. Hudson County Freeholders, 55 N.J.L. 88, 25 Atl. 322 (1892); Greenville R.R. v. Parlow, 5 Rich. 428 (S.C. 1852); Long v. Shirley, 177 Va. 401, 14 S.E.2d 375 (1941).

131. Department of Public Works and Bldgs. v. Divit, 182 N.E.2d 749 (Ill. 1962); Hamilton v. Pitt., etc., 190 Pa. 51, 42 Atl. 369 (1899).

132. Dickinson v. Brown-Crummer Inv. Corp., 137 F.2d 615 (10th Cir. 1943); People v. McReynolds, 31 Cal. App.2d 219, 87 P.2d 734 (1939); Hoyt v. Stamford, 116 Conn. 402, 165 Atl. 357 (1933).

133. Knoxville v. Barton, 128 Tenn. 177, 159 S.W. 837 (1913).

134. Chicago v. Spoor, 190 Ill. 340, 60 N.E. 540 (1901).

134a. McCoy v. Union El. R.R., 247 U.S. 354, 62 L.Ed. 1156 (1917); Bauman v. Ross, 167 U.S. 548, 42 L.Ed. 270 (1896).

135. Pittsburgh, etc., R. v. Wolcott, 162 Ind. 399, 69 N.E. 451 (1904); Tobie v. Brown County Comm'rs, 20 Kan. 14 (1878).

tion,[136] but the Supreme Court of the United States has held that benefits may be constitutionally set off only when they are *special benefits* to the property owner as opposed to *general benefits*.[137]

A diversity of opinion has developed in the courts regarding set off procedures for benefits.[138] South Carolina in earlier decisions held that all benefits could be set off from the compensation to be paid a property owner for the loss of his land.[139] A subsequent constitutional provision, however, provided that when private property was taken by corporations who had been delegated the power of eminent domain, compensation must be made "irrespective of any benefits from any improvements proposed by such corporation."[140] The word "corporations" excludes municipal corporations who are permitted to set off all benefits from the damages to the remaining land.[141]

Stated broadly, an individual property owner who loses his property through eminent domain procedures will derive constitutional protection for full and complete compensation for the *actual* loss considering the benefits accrued to his remaining land by the improvements as well as the damage. The "loss" is to be interpreted as compensation for the *taking of the land* and not just for *the land taken.* Even though the legislature may determine the criteria for ascertaining the compensation to be awarded the property owner,[142]

136. *Cf.*, Washa v. Prairie County, 186 Ark. 530, 54 S.W.2d 686 (1932); State H'wy Board v. Bridges, 60 Ga. App. 240, 3 S.E.2d 907 (1939); Yancey v. State H'wy & Public Works Comm., 218 N.C. 438, 11 S.E.2d 314 (1940); Nowaczyk v. Marathon County, 205 Wis. 536, 238 N.W. 383 (1931). See 1 ORGEL, VALUATION UNDER EMINENT DOMAIN §7 (2d ed. 1953).

137. Briscoe v. Rudolph, 221 U.S. 547, 55 L.Ed. 848 (1911).

138. *Cf.*, Washa v. Prairie County, 186 Ark. 530, 54 S.W.2d 686 (1932); State H'wy Board v. Bridges, 60 Ga.App. 240, 3 S.E.2d 907 (1939); Yancey v. State H'wy & Public Works Comm., 218 N.C. 438, 11 S.E.2d 314 (1940); Nowaczyk v. Marathon County, 205 Wis. 536, 238 N.W. 383 (1930). See ORGEL, VALUATION UNDER EMINENT DOMAIN §7 (2d ed. 1953).

139. Greenville Ry. v. Parlow, 5 Rich. 428 (S.C. 1852); Charleston Ry. v. Blake, 12 Rich. 634 (S.C. 1860).

140. S.C. Const. art. IX, §20 (1895); see Bowen v. Atlantic Coast Line Ry., 17 S.C. 574 (1882); Charleston Ry. v. Leech, 33 S.C. 179, 11 S.E. 631 (1890).

141. See Bramlett v. Greenville, 83 S.C. 110, 70 S.E. 450 (1911); Bailey v. Clinton, 88 S.C. 118, 70 S.E. 446 (1911).

142. United States *ex rel.* T.V.A. v. Indian Creek Marble Co., 40 F. Supp. 811 (E.D. Tenn. 1941); Pickens County v. Jordon, 239 Ala. 589, 196 So. 121 (1940); *In re* Appropriation of Easements for H'wy Purposes, 172 Ohio St. 524, 178 N.E.2d 787 (1961).

the ultimate power to settle eminent domain compensation questions resides with the judiciary.[143]

PUBLIC USE UNDER EMINENT DOMAIN

"No question has ever been submitted to the courts upon which there is greater variety and conflict of reasoning and result than that presented as to the meaning of the words 'public use' . . . ."[144] This often quoted expression of apparent frustration aptly describes the judicial maze through which eminent domain has trod since its inception as a sovereign power. Although it is universally agreed that private property cannot constitutionally be taken for public use by the sovereign or by those to whom the sovereign has delegated authority unless compensation is given, there has never been any universal agreement on a definition of public use; it would actually seem incapable of a precise definition that would be judicially useful.[145]

It is interesting to note that the common ground of agreement, *i.e.*, that no private property can be taken for private re-use, was not expressly forbidden by any of the earlier constitutions.[146] It is settled beyond question, however, that the prohibition against such a taking is implied in the constitutional meaning.[147]

Although a common ground has never been reached in the quest for a succinct definition of public use, two lines of judicial opinions have been demarcated. The dichotomy chiefly centers around the definition of "use" itself.

"Use," employed in a "public use" context is susceptible to two definitions: (1) employment, application, or service; (2) benefit, advantage or utility.[148] Those courts which

143. Mononghela Navigation Co. v. United States, 148 U.S. 312, 37 L.Ed. 463 (1893); Beals v. Los Angeles, 23 Cal.2d 381, 144 P.2d 839 (1944); City of Rock Hill v. Cothran, 209 S.C. 357, 40 S.E.2d 239 (1946).

144. Dayton G. & S. Mining Co. v. Seawell, 11 Nev. 394, 400-1 (1876).

145. See City of Melo Park v. Artino, 151 Cal.App.2d 261, 311 P.2d 135 (1957); Fountain Park Co., 199 Ind. 95, 155 N.E. 465 (1927); Edens v. City of Columbia, 228 S.C. 563, 91 S.E.2d 280 (1956); State *ex rel.* Chelan Elec. Co. v. Superior Ct., 142 Wash. 270, 253 Pac. 115 (1927).

146. See 2 NICHOLS, LAW OF EMINENT DOMAIN *op. cit. supra* note 109, §7.1.

147. See Connecticut College v. Calvert, 87 Conn. 421, 88 Atl. 633 (1913); Young v. Wiggens, 240 S.C. 426, 126 S.E.2d 360 (1962); *In re* Barre Water Co., 62 Vt. 27; 20 Atl. 109 (1890).

148. WEBSTER, NEW COLLEGIATE DICTIONARY (2d ed. 1958).

once supported the former interpretation held to a narrow scope of eminent domain application. Thus, in order to constitute a "public use," it was mandatory that the public in some manner actually use (or have the right to use) the property appropriated; "public use," then, meant "use by the public."[149] Although this definition implies use by the public at large, courts did allow this conception of public use to be applicable to inhabitants of a small or a restricted area, *provided* that the use be in common as opposed to use by private individuals.[150]

Obviously, this refined definition, calling for use by the public, could raise some immediate problems in specific fact situations; the necessary degree of use by the public,[151] the public service corporations who charge for services,[152] and the privately owned but truly public facilities[153] are a few examples that seem to shroud the definition "use by the public" in an atmosphere of uncertainty. Through the complexities of various factual situations this definition became weakened by the practicalities of application.[154]

Courts, by necessity rather than by academic judicial reasoning, began to apply a broader interpretation to the definition of public use. It would seem to be logical that when the necessities of the public became more acute in the growing industrial society of the twentieth century, the sovereign power of eminent domain was the obvious tool to employ within the constitutional limitations. Consequently, it was recognized that the term "public use" must be changeable

149. West River Bridge Co. v. Dix, 6 How. 507, 12 L.Ed. 535 (1848); *In re* Opinion of Justices, 211 Mass. 624 (1912); *Re* New York, 135 N.Y. 253, 31 N.E. 1043 (1892); Pennsylvania M. L. I. Co. v. Philadelphia, 242 Pa. 47, 88 Atl. 904 (1913); Nichols v. Central Va. P. Co., 143 Va. 405, 130 S.E. 764 (1926); Hench v. Pritt, 62 W.Va. 270, 57 S.E. 808 (1907).

150. Bedford Quarries Co. v. Chicago & L. Ry., 175 Ind. 304, 94 N.E. 326 (1911); Chesapeake Stone Co. v. Moreland, 126 Ky. 656, 104 S.W. 762 (1907); Pocantico Water Works Co. v. Bird, 130 N.Y. 249, 29 N.E. 246 (1891).

151. *E.g.*, Bradley v. Fallbrook Irrg. Dist., 68 Fed. 948 (S.D. Cal. 1895); *cf.*, Young v. Dugger, 23 N.M. 613, 170 Pac. 61 (1918) (irrigation of land).

152. *E.g.*, Stanley v. Jat St. Connecting R.R., 100 Misc. 493, 166 N.Y.S. 119 (1917); *cf.*, Collier v. Union R.R., 113 Tenn. 96, 83 S.W. 155 (1904) (railroad spur tracks).

153. *E.g.*, Dayton G. & S. Mining Co. v. Seawell, 11 Nev. 394 (1876); Witcher v. Holland Waterworks Co., 66 Hun. 619, 20 N.Y.S. 560 (1892).

154. See NICHOLS, THE MEANING OF PUBLIC USE IN THE LAW OF PUBLIC DOMAIN, 20 B.U.L.REV. 615 (1940).

as the needs of the public change,[155] permitting the sovereign power of eminent domain to be constant in sovereign exercise, but not static in application.

This philosophy allowed the judicial definition of public use to expand to meet the needs of the public; it thus became defined as public advantage or benefit, thereby employing the alternate definition of use. Such definition permitted total employment of community development *if* and *when* the sovereign determined that the use was public, the judiciary having the final review of such authorization.[156]

Illustrative of the change in what was considered a need for the public are the housing and slum clearance cases. To provide low cost housing and eliminate slums, Congress in 1937 enacted a housing statute which granted assistance to states that would participate in the program.[157]

To administer such a program, eminent domain powers were obviously necessary. The question confronting the courts in terms of public use was: *Can private property be condemned under eminent domain and its re-use be definitely restricted to a small portion of the public?* If the test were to be strictly limited to "use by the public" in its strictest application, the question would necessitate a broadening at best. As early as 1936, however, New York State held that such takings were constitutional as "the essential purpose of the legislation is not to benefit that class or any class [*i.e.*, persons with income under $2,500 per year]; it is to protect and safeguard the entire public from the menace of slums."[158] The dual goals justifying public use, then, was the elimination of slums and the establishment of low cost public housing. Other courts followed this decision, reasoning that the removal of slums and the establishment of a facility whereby a reasonable segment of the public could participate would

155. *E.g.*, Collier v. Union Station R.R., 113 Tenn. 96, 83 S.W. 155 (1904), "The term 'public use' is a flexible one. It varies and expands with the growing needs of a more complex order." 83 S.W. at 162; Tanner Tunnel, Mining & Reduction Co., 35 Colo. 593, 83 Pac. 464 (1906), "The definition of 'public use' must be such as to give it a degree of elasticity capable of meeting new conditions and improvements and needs of society." 83 Pac. at 465.

156. Mononghela Navigation v. United States, 148 U.S. 312, 37 L.Ed. 463 (1893); Beals v. Los Angeles, 23 Cal.2d 381, 144 P.2d 839 (1944).

157. 50 Stat. 888 (1937), 42 U.S.C. §§ 1401-30 (1940).

158. New York Housing Authority v. Muller, 270 N.Y. 333, 1 N.E.2d 153, 156 (1936). See Comments: 5 BROOKLYN L.REV. 327 (1936); 35 MICH.L.REV. 148 (1936).

justify the eminent domain powers.[159] It must be noted that at this juncture the program called for both the elimination of slums and the establishment of low cost housing when redeveloped. In other words, the slum problem was an equally important reason for the passage of the Federal act.

When housing requirements became fairly fulfilled (although this is a continuing program), slum clearance still maintained its importance. Consequently, it was held that the *taking* itself was sufficient to constitute the public use and the disposition of the property was incidental to the public use not requiring any subsequent rehousing.[160] Congress encouraged programs which permitted the property to be disposed of into private hands and allowed the property to become productive. Through the Federal Housing Act of 1949,[161] capital grants and loans were provided for local housing authorities. These funds were used to clear and prepare land for re-use. With the primary goal of slum clearance and low cost housing, the programs could include commercial and industrial development.[162] The individual state statutes comprise the urban development laws for these programs.[163]

The significant point in these decisions, over and above the public use concept, was the disposal of the property. Since the use was satisfied with the taking of the land, the ultimate disposition into private hands did not invalidate the taking. The courts which followed this reasoning[164] eliminated one of the necessary evils of eminent domain: the collection of land by the sovereign. Without such a concept the sovereign would be limited to take land only when it could be used by the public, in fact, even though the taking might constitute

159. *E.g.*, Williamson v. Housing Authority of Augusta, 186 Ga. 673, 199 S.E. 43 (1938); McNulty v. Owens, 188 S.C. 377, 199 S.E. 425 (1938).
160. *E.g.*, Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 104 A.2d 365 (1954); Randolph v. Wilmington Housing Authority, 139 A.2d 476 (Del. 1958); City Housing Authority v. Berkson, 415 Ill. 159, 112 N.E.2d 620 (1953).
161. 63 Stat. 413 (1949), 42 U.S.C. §1441 (1952).
162. See URBAN RENEWAL: PROBLEM OF ELIMINATION AND PREVENTION OF URBAN DETERIORATION 72 HAR.L.REV. 504 (1959); SYMPOSIUM-URBAN RENEWAL, LAW AND CONTEMPORARY PROBLEMS, 1, 2, Vols. XXV-4, XXVI-1 (Duke U.S. of Law 1960-61).
163. *Ibid.*
164. *E.g.*, Herzinger v. Mayor & City Council of Balt., 203 Md. 49, 98 A.2d 87 (1953); Denihan Enterprises, Inc. v. O'Dwyer, 302 N.Y. 451, 99 N.E.2d 235 (1951); Schenck v. City of Pittsburgh, 364 Pa. 31, 70 A.2d 612 (1950).

a public use. By employing such rationalization that the taking satisfies the use requirements, land can be permitted to become productive and serve the public advantage in the truest sense. If this were not the case, the sovereign could well destroy productivity either by allowing harmful effects of land to continue to exist because of the disposition problem (*e.g.*, slums) or by accumulating a vast inventory of land and exempting it from productive use. Either choice is against the public interest, individual rights notwithstanding.

The first state to pass a redevelopment law permitting private re-use was New York in 1942; it was subsequently held constitutional the following year.[165] Today twenty-eight state courts of last resort have upheld the constitutionality of slum clearance and urban redevelopment enabling legislation, and forty-five states have enabling legislation or specific constitutional provisions (or both) authorizing public agencies to undertake slum clearance and urban redevelopment projects.[166]

In 1954 another major expansion of public use was promulgated by the United States Supreme Court. In *Berman v. Parker*[167] the court permitted the power of eminent domain to be employed for the removal of "blighted" areas which were capable of rehabilitation; the disposition of the land was to private redevelopment. In modifying the District Court's position[168] that eminent domain should be used only for the elimination of conditions injurious to the public health, safety and morals, Mr. Justice Douglas stated:

> . . . We think the standards prescribed [by the act[169]] were adequate for executing the plan to eliminate not only slums as narrowly defined by the District Court but also the blighted areas that produce slums.[170]

Carrying the concept to its obvious conclusion in support of public use as public advantage, Mr. Douglas said: ". . .

165. N.Y. Unconsol. Laws §3301 (McKinney 1942); Murray v. La Guardia, 291 N.Y. 320, 52 N.E.2d 884 (1943), *cert. den.*, 321 U.S. 771, 88 L.Ed. 1066 (1944).

166. For a list of citations to statutes, constitutional provisions, and court decisions, see U.S. Housing and Home Finance Agency, State Enabling Legislation, Urban Redevelopment and Urban Renewal (June 1962).

167. 348 U.S. 26, 99 L.Ed. 27 (1954).

168. Schneider v. District of Columbia, 117 F.Supp. 705 (D.D.C. 1953).

169. District of Columbia Redevelopment Act, 60 Stat. 790, D.C. Code §5-701-5-719 (1951).

170. Berman v. Parker, 348 U.S. 26, 99 L.Ed. 27, 39 (1954).

[i]f those who govern the District of Columbia decide the nation's capital should be beautiful as well as sanitary, there is nothing in the Constitution . . . that stands in the way."[171]

The Florida courts also became entangled in the blight versus slum situation. In 1952, two years prior to the *Berman* decision, the Supreme Court of Florida held that land could not be taken for urban redevelopment if the property was to be disposed of by private redevelopment.[172] In 1959, five years after the *Berman* decision, the court held that the clearance and redevelopment of *slum areas* as distinguished from *blighted areas* is public use justifying a taking under eminent domain, and the subsequent disposition of the property is incidental.[173] This "distinguishing" feature permitted the court to completely reverse itself. At any rate, the availability of re-use for private individuals is provided in Florida by the public use, qualification being satisfied in the taking for the eradication of slums.

Of the five states that do not have enabling legislation or specific constitutional provisions authorizing agencies to undertake slum clearance or urban redevelopment projects, three are western states: Wyoming, Utah and Idaho. Their *combined* population is less than many major metropolitan areas in the country[174] which would necessarily decrease any need for this type of eminent domain activity. The lack of such enabling legislation in these three states does not necessarily connote opposition to the broad judicial interpretation of public use but amplifies the reasoning that the expanded use of the term is based on the social order in terms of need.

The remaining two states without specific enabling legislation or constitutional provisions are Louisiana and South Carolina. Louisiana in 1954 repealed[175] certain sections of their Housing Authority Law[176] which provided no enabling legislation for slum clearance and urban redevelopment in that state. In 1938, however, it was held that acquisition of

171. *Ibid.* at 38.
172. Adams v. Housing Authority of Daytona Beach, 60 So.2d 663 (Fla. 1952).
173. Grubstein v. Urban Renewal Agency of City of Tampa, 115 So.2d 745 (Fla. 1959); see Comment, 34 TUL.L.REV. 616 (1960).
174. Idaho: 667,191; Wyoming: 330,066; Utah: 890,627; Combined: 1,590,884, U.S. Dept. of Commerce, County and City Data Book, p.2 (1962).
175. La. Laws 1954, Acts 709, 711.
176. La. Rev. Stat. §§40:381-40:572.

private property by a Housing Authority was for a public use or purpose within the meaning of the constitution.[177]

South Carolina has upheld the acquisition of private property for the elimination of slums and the establishment of a low-rent housing project as "an exercise of a proper governmental function for a valid public purpose."[178] The Court, in commenting on slum elimination said: ". . . the conclusion is inescapable that bad housing conditions have an adverse effect on the health and morals of the city . . ., therefore, the elimination of these slum areas is a proper function of government, both city and state."[179] This reasoning would seem to pave the way for a subsequent decision holding that the public use can be satisfied in the taking similar to decisions in other jurisdictions.[180]

In a case in 1956, *Edens v. City of Columbia,* the South Carolina Supreme Court completely rejected this reasoning, holding that the taking of private property for the elimination of a slum to be disposed of by private redevelopment was not a public use and, consequently, would be unconstitutional.[181]

The court followed a definition of public use offered in a 1904 South Carolina case[182] which equated "public use" to a "use by the public" allowing that "the public must have a definite and fixed use of the property to be condemned. . . ."[183]

In commenting on the previous South Carolina decision upholding slum clearance and low-cost housing in other jurisdictions, the court said:

> Some of the decisions of other courts immediately in point are contrary to our view, which are not distin-

177. Porterie v. Housing Authority of New Orleans, 190 La. 710, 182 So. 725 (1938). For definitions of "public use" see Anglle v. State, 212 La. 1069, 34 So.2d 321 (1948); Miller v. Police Jury of Washington Parish, 266 La. 8, 74 So.2d 394 (1954).

178. McNulty v. Owens, 188 S.C. 377, 199 S.E. 425, 430 (1938).

179. *Ibid.* at 431-32.

180. *E.g.,* Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 104 A.2d 365 (1954); Randolph v. Wilmington Housing Authority, 139 A.2d 476 (Del. 1958); City Housing Authority v. Berkson, 415 Ill. 159, 112 N.E.2d 620 (1953).

181. 228 S.C. 563, 91 S.E.2d 280 (1956), see Comments, 8 S.C.L.Q. 457 (1956); 16 MD.L.REV. 172 (1956); 41 MINN.L.REV. 219 (1957).

182. Riley v. Charleston Union Station Co., 71 S.C. 457, 51 S.E. 485, 496 (1904).

183. *Ibid.*

> guishable upon different constitutional provisions or former judicial interpretations, proceed upon the theory that public use is accompanied by the seizure and destruction of slum or "blighted" areas, and the disposition of the land thereafter to private owners for private purposes is merely incidental. We think this would be a strained view of the facts in the case *sub judice,* and we cannot follow it. The purpose here is not to provide better, low cost housing to present occupants of the area, or, indeed, any housing at all; but is to transform it from a predominantly low class residential area to a commercial and industrial area. *It seems to us a grandiose plan which cannot be dissected and the result of it reasonably said to be incidental.*[184] [Emphasis added.]

Here, the "taking" for the elimination of slums recognized by a previous decision as "a proper function of government"[185] was prohibited by looking to the *disposition* and not the *taking* itself. Hence, South Carolina has two choices under the present interpretation: (1) allow the continued existence of slum areas or (2) condemn slum areas under eminent domain but re-use the land publicly. As discussed earlier, the prohibition of productive re-use of the property encourages non-productive use of the property. Eminent domain proceedings used effectively in other jurisdictions to increase community development seem to be based on the interpretation of public needs as interpreted by the legislature in its authorization. The South Carolina decision does not look to the need but to the disposition. Further, the rights of the property owner do not seem to be in point here since South Carolina recognizes the power of eminent domain; it is only the application that seems to be wanting in a contemporary interpretation of public use.

Probably the antithesis of the *Edens* decision is the *Cannata v. City of New York* case.[186] An area designated for eminent domain proceedings had 75% of the land vacant with the

184. Edens v. City of Columbia, 228 S.C. 563, 573, 91 S.E.2d 280, 282 (1956).

185. *E.g.,* Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 104 A.2d 365 (1954); Randolph v. Wilmington Housing Authority, 139 A.2d 476 (Del. 1958).

186. 24 Misc.2d 694, 204 N.Y.S.2d 982 (1960), *modified and affirmed,* 14 App.Div.2d 813, 221 N.Y.S.2d 457 (1961), *affirmed,* 11 N.Y.2d 210, 182 N.E.2d 395 (1962), *cert. den.,* 371 U.S. 4, (1962). See Comment, 38 NOTRE DAME L.REV. 210 (1963).

remaining 25% occupied by dwellings in sound and sanitary condition with no tangible blight. The land was slated for eminent domain proceedings because of the need for commercial and industrial growth and the availability of rail transportation on the site. The statute[187] authorizing such a taking was upheld as constitutional since the plan was interpreted as valid public use. The Supreme Court of the United States denied an appeal for absence of a substantial Federal question.[188]

It would seem that the point of difference between the *Edens* case and the *Cannata* case hinges on the definition of public use alone without any reference to the property owners involved. Both jurisdictions obviously recognized that the private property owner's rights are subservient to the sovereign. Since the power is absolute, the employment is subject only to the constitutional limitations and the judicial interpretation thereof. Warnings have been issued by courts that the expanded definition may usurp fundamental property guarantees unless curbed definitions result.[189]

It must be remembered that when a question of public use comes before the court, the court does not determine whether the taking *is* public, but whether the legislature might reasonably *consider* the taking public. No act by the legislature, then, will be held unconstitutional unless it is obviously in violation of the will of the people as declared in the fundamental law. The problem, therefore, is one for the legislature and not for the courts.

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187. N.Y. Gen. Municipal Law §72-n; recodified, "Urban Renewal Law," N.Y. Gen. Municipal Law §§500-525 (Supp. 1962).

188. Cannata v. City of N.Y., 24 Misc.2d 694, 204 N.Y.S.2d 982 (1960), *modified and affirmed*, 14 App.Div.2d 813, 221 N.Y.S.2d 457 (1961), *affirmed*, 11 N.Y.2d 210, 182 N.E.2d 395 (1962), *cert. den.*, 371 U.S. 4 (1962).

189. *E.g.*, Schneider v. District of Columbia, 117 F.Supp. 705 (D.D.C. 1953), "These extensions of the concept of eminent domain, to encompass public purpose apart from public use, are potentially dangerous to basic principles of our system of government." at 117 F.Supp. 716; Cannata v. City of New York, 11 N.Y.2d 210, 182 N.E.2d 395 (1962), "Conceding that the power of eminent domain has been extended to the elimination of areas that are actually slum, the question . . . is whether this power can be further extended to the condemnation of factories, stores, private dwellings, or vacant land which are properly maintained and are neither substandard nor unsanitary, so that their owners may be deprived of them against their will to be sold to a selected group of private developers whose projects are believed by the municipal administration to be more in harmony with the times." (dissenting opinion) 182 N.E.2d at 398.

It is interesting to note that the universally accepted governmental powers of taxation and policy authority of the Federal government and the states actually are broader than eminent domain powers, considering the compensation question.[190] These powers, as eminent domain powers, should be viewed in a total view of their purpose: to benefit the public. The elasticity of governmental powers should not be viewed as a vice but as a virtue, since their usefulness should parallel the community needs as the sovereign sees these needs.[191] Consequently, set definitions of the component parts of eminent domain should be avoided. The power is actually in the hands of the people who are the sovereign under our democratic system. If their voice, the legislature, decides to expand or contract the limitations, the result would seem to be the will of the people.[192] The courts have done nothing more than protect and interpret that need.

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190. *E.g.*, Louisville Joint Stock Bank v. Radford, 295 U.S. 555, 79 L.Ed. 1593 (1934); Clark v. Nash, 198 U.S. 361, 49 L.Ed. 1085 (1905); Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683 (1955).

191. In a dissenting opinion, Mr. Justice Holmes declared ". . . when legislatures are held to be authorized to do anything considerably affecting public welfare, it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use. The former expression is convenient to be sure, to conciliate the mind to do something that needs explanation: the fact that the constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme; that property rights may be taken for public purposes without pay if you do not take too much; that some play must be allowed to the joints if the machine is to work. But police power is used in a wide sense to cover, and, as I said, to apologize for the general power of the legislature to make a part of community uncomfortable by a change. I do not believe in such apologies. *I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain.* [Emphasis added.] The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it." Tyson and Brother v. Banton, 273 U.S. 418, 71 L.Ed. 718, 729 (1927).

192. In the words of Mr. Justice Brandeis: "Nearly all legislation involves a weighing of public needs as against private desires; and likewise a weighing of relative social values. Since government is not an exact science, prevailing public opinion concerning the evils and the remedy is among the important facts deserving consideration; particularly, when the public conviction is both deep-seated and widespread and has been reached after deliberation. What, at any particular time, is the paramount public need is, necessarily, largely a matter of judgment." Dissenting opinion in Truax v. Corrigan, 257 U.S. 312, 66 L.Ed. 254, 274 (1921).

It is elementary to say that eminent domain powers are a useful tool in today's contemporary society; but it is necessary that the tool be understood in its application. Like any tool, it should be exercised with the most benefit to the master. The people are the masters of the power and if their will dictates a certain application, the use should be honored within the constitutional framework. The worst result of any useful tool is that it may be allowed to become rusty and, consequently, ineffective, or, conversely, it may be over used, limiting its further effectiveness.

Accordingly, South Carolina may have permitted the use of the eminent domain power to become obsolete in relation to the needs of the time and, conversely, New York may have forced the use beyond a prudent course of action. The answers to these suppositions, however, will be found with the ultimate master of the power — the people, through their legislative voice.

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